PUBLIC PROSECUTOR

v.

BANAT BIN TAWAN

HIGH COURT SABAH AND SARAWAK, KOTA KINABALU
DATO' SULEIMAN BIN HASHIM J
[CRIMINAL APPEAL NO. K.42-06 OF 1994]
30 DECEMBER 1994

***CRIMINAL PROCEDURE**: Charge of rape - Penal Code s. 376 - Acquittal - Evidence sufficient for conviction under s. 354 - Alternative charge - Whether to be considered - Failure to consider alternative charge thereof - Whether fatal.*

This was an appeal by the Public Prosecutor against the decision of the Sessions Judge acquitting the respondent of a charge of rape under s. 376 Penal Code. In the Court below, apparently, sufficient evidence had been adduced for a conviction under s. 354 of the Code, but no submission was tendered by the prosecution for a conviction under this alternative section. Before the learned Judge the learned Deputy Public Prosecutor contended that, notwitstanding the non-submission, the learned Sessions Judge in the circumstances ought to have found the respondent guilty under the said s. 354, instead of acquitting the accused outright under s. 376.

Held:

[1] The learned Sessions Judge was right when she concluded that there was insufficient evidence for a conviction under s. 376 Penal Code. However, bearing in mind the evidence adduced by the prosecution and the defence, it was incumbent that she proceeded to consider all the evidence as a whole and in its entirety. This she clearly failed to do.

[2] In this case the evidence as a whole justified a conclusion of guilt under s. 354 Penal Code, and hence, a finding of guilt under this section ought to be entered against the respondent.

[Appeal allowed. Respondent convicted under s. 354 Penal Code].

Cases referred to:

Mahinder Singh v. PP [1967] 1 MLJ 12 6 FC ***(refd)***
Wong Swee Chin v. PP [1981] 1 MLJ 212 FC ***(refd)***
PP v. Salleh bin Saad [1983] 2 MLJ 164 ***(refd)***
PP v. Lin Lian Chen [1992] 2 MLJ 561 SC ***(refd)***
Attan v. PP [1970] 2 MLJ 143 ***(refd)***
Yap Ee Kong v. PP [1981] 1 MLJ 144 FC ***(refd)***
Ho Ming Siang v. PP [1966] 1 MLJ 252 FC at 256 ***(refd)***
PP v. Lim Chen Len [1981] 2 MLJ 41 ***(refd)***
Yusoff bin Kassim v. PP [AC 93) ***(refd)***
PP v. Ku Lip See [1981] 1 MLJ 258 ***(refd)***
Mohd. Radii v. PP [1991] 3 MLJ 169 SC ***(refd)***

Legislation referred to:

Criminal Procedure Code (FMS Cap. 6), ss. 399 & 402(i).
Evidence Act 1950, ss. 32(i)(b) & 134.
Penal Code, ss. 354 & 376.

For the appellant - Mohd. Yazid bin Haji Mustafa; DPP
For the respondent - Ansari bin Abdullah Ali

JUDGMENT

Suleiman bin Hashim J:

Accused was charged:

> That you, on 16 September 1982, at about 10.00 a.m. at Kampong Gaur, in the District of Kota Belud, in the State of Sabah, committed rape on one Eliamini bte Tabilih (F), 36 years, and that you have thereby committed an offence punishable under s. 376 of the Penal Code (FMS Cap. 45) of the Laws of Malaysia.

At the conclusion of the trial the learned Judge Sessions Court found accused not guilty, acquitted and discharged accused.

This is the appeal by the learned Deputy Public Prosecutor.

The learned DPP agrees with and concedes to the submission of Encik Ansari bin Abdullah Ali, Counsel for accused, that the medical report (P6) on the alleged victim (PW1), the medical report (P7) on accused, both by Dr. Teh Boon Teong were inadmissible, were wrongly admitted as evidence, there being no compliance with the proviso to s. 399, Criminal Procedure Code (FMS Cap. 6). And the evidence of Constable Magibun Gundolot (PW5) to make P6 and P7 admissible under s. 32(i)(b), Evidence Act, 1950 is hearsay. I agree that P6 and P7 were inadmissible, were wrongly admitted as evidence.

The learned DPP says that with the exclusion of P6 and P7, while there is insufficient evidence for a conviction under s. 376 Penal Code there is sufficient evidence to a conviction under s. 354 Penal Code based on the evidence of PW1, Tabilih bin Taliban (PW2), PW1's father, and ASP Zam Zani (PW3), and asks me to substitute the order of the learned Judge Sessions Court with a conviction under s. 354 Penal Code.

With respect, I agree with the learned DPP. There is s. 134 Evidence Act 1950.

Identification of accused:

In *Mahinder Singh v. PP* [1967] 1 MLJ 126 FC:

> These directions are impeccable and it is undoubtedly true to say that the conviction must stand or fall according as the evidence of the complainant was believed or not. Because the Judge considered `his evidence as regards his ability to identify his assailant was completely unshaken' he found the appellant guilty.
>
> With respect, we think that the Judge had taken too narrow a view. It was not sufficient merely that the complainant appeared quite certain in his own mind that the accused was his assailant. It was clearly necessary for the Court to examine also the grounds of his belief before regarding the question as closed. We have therefore, taken into consideration the complainant's answers elicited in cross-examination, which were undoubtedly material but which the Judge had failed to take into account.

The grounds in the present case, the evidence of PW1 is:

> Saya tahu dia bangsa Bajau Kerana saya pernah berjumpa dengannya sebelum ini. Bukan sekampung dengan saya, kampungnya diseberang sungai. Saya tidak kenal nama tetapi kenal rupanya. Ya, orang Bajau itu ada di Mahkamah ini. (Orang Kena Tuduh dicam oleh Saksi Pendakwa 1 - orang Bajau).

And the alleged incident was on 16 September 1982 at about 10.00 a.m. With the alleged assault over a span of time giving PW1 opportunity to see the identity of her assailant, as alleged by PW1. And accused did not challenge, did not cross-examine PW1 as regards the grounds for the identification, *Wong Swee Chin v. PP* [1981] 1 MLJ 212 FC, *PP v. Salleh bin*

Saad [1983] 2 MLJ 164, *PP v. Lin Lian Chen* [1992] 2 MLJ 561 SC on failure to challenge, failure to cross-examine.

I find PW1's identification of accused positive.

Evidence of PW1, PW2 and PW3:

The evidence of PW1 is that accused said to her "Saya mahu cuba kau" followed by an account of what happened, including that accused:

> menumbok dibahagian belakang saya...menendang saya...saya terus jatuh...Dia mengheret saya...Baju saya (Skirt/kun) koyak akibat tersangkut duri...Kemudian Orang Kena Tuduh menangkap saya dari bawah. Pada ketika itu saya tidak mamakai seluar dalam...Orang Kena Tuduh bersetubuhkan saya lebih kurang dua minit sahaja...Saya juga menerima kecederaan dibahagian peha dan kaki akibat terkena kayu...Selepas itu saya pergi kerumah bapa saya bernama Tabilih...menceritakan kepada bapa saya."

> PW1, PW2 and another went out to look for accused saw him walking crossing the river towards his house, PW1 then went to the Police Station where she made her Police Report (P2), made on the same day 16 September 1982 at about 12.30 p.m. PW1 identified her torn skirt (P1), her T-shirt (P3).

The evidence of PW2 included that:

> Pada 16 September 1982 jam 11.30 pagi anak saya Saksi Pendakwa No. 1 datang ke rumah saya dengan keadaan menangis. Keadaan pakaian dia iaitu kun/skirt telah koyak. Saya tidak ingat kalau ada luka di badan Saksi Pendakwa No. 1. Saksi Pendakwa No. 1 memberitahu kepada saya yang Saksi Pendakwa No. 1 telah diserang oleh seorang lelaki bangsa Bajau. Dia hanya memberitahu yang dia telah diserang tetapi tidak memberitahu yang dia telah dirogol. Saksi Pendakwa No. 1 telah memberitahu kepada saya yang dia nampak orang itu. Kami terus pergi mencari orang itu. Kami tiga orang iaitu Saksi Pendakwa No. 1, Sallin seorang lelaki dan saya pergi mencari orang yang menyerang saya. Kami dapat menjumpai Orang Kena Tuduh semasa dia dalam perjalanan pulang ke rumahnya. Saksi Pendakwa No. 1 yang memberitahu bahawa itulah orangnya yang mengancamnya.
>
> (Saksi Pendakwa No. 2 camkan Orang Kena Tuduh di Mahkamah sebagai orang yang mengacau anaknya Saksi Pendakwa No. 1).

The evidence of PW3 included that:

> Pada 16 September 1982 pada jam 12.30 tengahari saya berada di pejabat saya dan kes rogol telah dilaporkan kepada saya. Saya telah berjumpa dengan mangsa tersebut. Saya tidak berapa ingat nama mangsa itu tetapi boleh kenal rupanya.
>
> (Saksi Pendakwa No. 3 Cam Saksi Pendakwa No. 1 sebagai Si Mangsa).
>
> Masa itu mangsa terkejut, luka dibahagian muka dan kaki dan hidungnya berdarah. Mangsa beritahu kepada saya bahawa pagi tersebut hendak menuju ke rumah bapanya melalui hutan, dia telah tersempak dengan seorang lelaki. Selepas aduan membuat laporan saya minta dia bawa saya ke tempat kejadian. Saya menghantar aduan ke hospital untuk diperiksa. Saya telah mengambil pakaian.
>
> (Pendakwa Raya mengemukakan Exp. 1 - Exp. 3 dan Exp. 4 kepada Saksi Pendakwa No. 3. Saksi Pendakwa No. 3 cam bahawa itulah pakaian yang diambil olehnya).

Thus while the evidence of PW2 and PW3 do not corroborate the evidence of PW1, as to what is corroboration with respect there are ample authorities including *Attan v. PP* [1970] 2 MLJ 143 and *Yap Ee Kong v. PP* [1981] 1 MLJ 144 FC full bench, the evidence of PW2 and PW2 does lend credibility to the evidence of PW1, does support the evidence of PW1 as to PW1's condition, PW2 saying *inter-alia*, "keadaan menangis", "keadaan pakaian dia iaitu

kun/skirt telah koyak", PW3 says *inter-alia*, "masa itu mangsa terkejut, luka dibahagian muka dan kaki dan hidungnya berdarah" both PW2 and PW3 said PW1 told them about the assault by accused and all this was soon, immediately at first available opportunity by PW1.

I do not think there was any fabrication of evidence by PW1, PW2, PW3. I do not think there was any conspiracy involving PW1, PW2 or any extended conspiracy involving PW1, PW2, and PW3, "not a scrap of evidence to suggest that any individual police officer" or anyone "had the slightest personal ground for bearing any malice" towards accused, *Ho Ming Siang v. PP* [1966] 1 MLJ 252 FC at 256.

And I do not think this is a case of wrong identification of accused by PW1.

The Defence:

accused gave evidence on oath supported by Senawi bin Rundai (DW2), a friend of accused. The defence is an alibi without having given the required mandatory "not merely procedural" notice, s. 402A(i), Criminal Procedure Code, *PP v. Lim Chen Len* [1981] 2 MLJ 41.

In *Lim Chen Len* it was held, *inter-alia*:

> Without the alibi evidence, the learned Magistrate would not have found that the defence had created a doubt in the prosecution case." The order of acquittal/discharge by Magistrate, s. 384 Penal Code substituted with guilty/convicted, fine RM1,000 in default six months imprisonment.

Be that as it may be in the present case:

(1) On 11 March 1991 the trial commenced, accused was not represented by Counsel.

(2) On 15 March 1991 accused was represented by Encik Adriansa Arsat, "just been appointed".

(3) On 8 June 1993 Prosecution closed its case, on 26 July 1993 when the learned Judge Sessions Court "found that there is a *prima facie* case against the accused" called for the defence, accused was represented by Encik Ansari bin Abdullah Ali, "just been engaged last week".

The defence is odd. On 25 October 1993, 11 years 1 month 9 days after the alleged incident while accused said "Peristiwa berkenaan dengan kejadian 16 September 1982 saya tidak ingat lagi. Saya tidak ingat jam berapa saya ditangkap cuma saya ingat tengahari", "tidak ingat" yet accused could remember in detail what according to accused, accused and DW2 did on that day, that they went "cari kerbau" followed by "menembak ikan", with details as to time, places, with interregnum period of about two hours between the two activities, with accused vacillating:

> Saya tidak tahu siapa orang yang mereka kata saya kacau. Saya kenal orang yang saya kena kacau. Saya cuma nampak bini orang itu pertama kali di Mahkamah. Bila saya nampak dia di Mahakamah saya kenal perempuan itu" and "Saya benar-benar tidak kenal simangsa", all this was not put to PW1 and PW1's grounds for identifying accused was not challenged.

The defence is also odd in that DW2 did not say anything at all about he and accused "menembak ikan".

When Appellate Court may/may not interfere with finding of facts by Court of first instance:

A recent leading authority is *Yusoff bin Kassim v. PP* [1992] 2 MLJ 183 SC, [1992] 3 CLJ 1535 SC:

> We recognised that the learned trial Judge had a great advantage, denied to his Court, of seeing and hearing the witnesses and the appellant testify. Be that as it may, there is a wealth of authority for the proposition that upon an issue depending upon oral evidence where there is plainly perjury on the one side or the other, a Court of Appeal ought to be greatly influenced by the opinion of the trial Judge, who has seen and heard the witnesses, except where he has failed to observe inconsistencies or to take account of material circumstances or probabilities. (See for example, *Khoo Sit Hoh & Ors. v. Lim Thean Tong* [1912] AC 93) (1). An Appellate Court can, therefore, in appropriate cases, act upon its own view of the conflicting evidence. [See *Coghlan v. Cumberland* [1898] 1 Ch.D. 704 (2); *Bigsby v. Dickenson* [1976] 4 Ch.D. 24] (3).
>
> In all the circumstances, having regard to the fact that the trial Judge had overlooked or failed to take into account or given proper consideration to, or drawn proper inferences from the matters to which we have adverted, which otherwise might have caused him to come to a different conclusion, we were satisfied that he had not taken proper advantage of his having seen and heard the witnesses [per Lord Thankerton in Watt or *Thomas v. Thomas* [1947] AC 484] (4) and so the present appeal came within the range of those cases where we were at liberty to act upon our own view of the conflicting evidence. Having done so, we were amply satisfied that 'the case against the appellant was not proved with that certainty which is necessary in order to justify a verdict of guilty.' [Per Hewart, CJ in *R. v. Wallace* 23 CAR 32, 35 C.C.A. (5) applied by Thomson, CJ in *Jubri v. PP* [1962] MLJ 24, 35 C.A. (6)].
>
> The result, therefore was, that we allowed the appeal, quashed the conviction, set aside the sentence of death and acquitted and discharged the appellant.

Finding of facts by the learned Judge Sessions Court:

The learned Judge Sessions Court found:

> Failure of the prosecution to prove beyond reasonable doubt that penetration took place and defence evidence denying raping PW1 is sufficient to raise reasonable doubt in prosecution case.
>
> After considering the evidence and all the circumstances in this case, the defence has successfully cast a reasonable doubt on the prosecution case which will warrant his acquittal.
>
> I there discharge and acquit the accused of the charge of rape against him.

What is reasonable doubt is, "after the entire comparison and consideration of all the evidence", "a doubt arising from the evidence or want of evidence", referred to in *PP v. Ku Lip See* [1981] 1 MLJ 258.

With respect in the present case the learned Judge Sessions Court did not adequately, did not sufficiently compare, consider all the evidence as a whole in its entirety, the case for the prosecution and the case for the defence, the learned Judge Sessions Court "had overlooked or failed to take into account or given proper consideration to, or drawn proper inferences" from the evidence as a whole in its entirety, the case for the prosecution and the case for the defence, *Yusoff bin Kassim* (*supra*). No doubt as in *Mohd. Radhi v. PP* [1991] 3 MLJ 169 SC:

Held, allowing the appeal:

(1) Even though the Judge does not accept or believe the accused's explanation, the accused must not be convicted until the Court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt on the prosecution case."

Conclusion

With respect in the present case the learned Judge Sessions Court is right that there is insufficient evidence for a conviction under s. 376 Penal Code but in all fairness to her, she did not get to hear a proper submission on an alternative charge under s. 354 Penal Code.

In the present case I agree with the learned Judge Sessions Court that the evidence do not justify a conclusion of guilt under s. 376 Penal Code but she did not get to hear proper submission on an alternative charge under s. 354 Penal Code.

In the present case the evidence as a whole in its entirety, the case for the prosecution and the case for the defence do justify a conclusion of guilt under s. 354 Penal Code and I find accused guilty and I convict accused under s. 354 Penal Code.

I shall pass sentence after hearing submissions from Encik Ansari bin Abdullah Ali and from the DPP.

With utmost respect should respondent wish to proceed on a reference under s. 66 Courts of Judicature Act, 1964 I shall gladly grant stay of execution of my sentence.